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There Is More to *Daubert* Than *Daubert*: Explanations and Critical Commentary as Illustrated Principally Through Handwriting Expertise

by

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Abstract: This *commentary* surveys the *Daubert* criteria and how an expert witness can satisfy them as well as applicable Federal Rules of Evidence. Quotes from the Federal Rules of Evidence are given. Citations to case reports illustrate the rulings various courts have made regarding the *Daubert* criteria and Federal Rules of Evidence. A model report is given in the appendix.

Key Words: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*; Handwriting expertise; Expert witness; Federal Rules of Evidence; Reliability; Peer review; General acceptance; Qualifications; Relevance; Voir dire; Expert reports; Publication; Admissibility; Rate of error; Specificity of qualifications.

Prefatory Remarks: I am not an attorney and I offer no legal advice, nor is anything herein represented as sufficiently reliable upon which one can base anything offered in any legal setting. This is a layperson's perceptions of how law and rules may affect the admissibility of the expert witness and the proffered testimony. Only a licensed attorney can offer proper counsel as to how the law may apply to your cause at court or to any evidence you might offer in support of your cause.

Some of the cases cited in this paper are unpublished, meaning they cannot be cited as legal precedents. They are offered as historical facts that illustrate application of the law and rules to a particular situation. In this way they have didactic value for both attorneys and expert witnesses.

I. INTRODUCTION

A. Overview

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786

(1993), is the U.S. Supreme Court case governing admissibility of expert witnesses in Federal Courts. In *Daubert* the Supreme Court did what courts of appeal have probably done since the inception of the very first one. It created new law and pretended everyone should have known about it and applied it as old law, although the newness of it all forced the Supreme Court later to make multiple clarifications as to what its *Daubert* decision meant. These clarifications hardly match in volume the multifarious interpretations legal scholars and lower courts of law have issued as to meaning of the various pronouncements in *Daubert* and its clarifications. Many legal scholars are so sure of what their own opinions about *Daubert* are that even explicit statements by the Supreme Court to the contrary are no deterrence to the repeated assertions of scholarly opinions.

However, making of new law by courts is like making fine sausage in slaughter houses. When the aromatic, tasty and eye-appealing sausage arrives on one's plate in an elegant restaurant, one does not avert to the messy and nauseous nature of the process leading from animal-on-the-hoof to savory meat on the plate. Thus it is in this exploration into *Daubert*.

Ultimately the focus will be on the finished and refined product.

B. The Rule Permitting Handwriting Expert Testimony

Federal Rule of Evidence 901 provides:

Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the

matter in question is what its proponent claims.

(b) Illustrations.

(c) Comparison by trier or expert witness.
Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

This rule provides a gate by which one can introduce a handwriting expert into a court trial, just as any witness must be provided with some legitimate gate. Whether this gate is open to a particular expert in a particular case is another matter. Rules for admissibility tell the proffering party how to persuade the judge to open the gate to let the expert witness in. The law gives the trial judge great latitude, called judicial discretion, in deciding whether the rules for opening the gate are sufficiently satisfied. Generally, absent clear proof upon appeal of abuse of discretion, the trial court's ruling will stand. Since this paper is restricted to the trial level itself, there will be no discussion of rules and practices upon appeal. Let this suffice: Generally, mastery and satisfaction of the rules for admission of expert evidence should make a litigant's expert evidence admissible at trial. If not, making a clear record at trial to preserve any perceived error for appeal as the rules require might yet save the case.

Thus, in *General Electric v. Joiner*, 522 US 126, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), it was held that the trial judge is the gatekeeper for admissibility of scientific expert evidence, and a ruling in that regard is reversible only for abuse of discretion, that is, acting unreasonably in a way totally unsupportable by law. Ideally, if at trial one explicitly satisfies all the rules and guidelines discussed herein, refusal of admission of one's expert evidence might be such an abuse of discretion. The ideal is one thing; the reality can be quite another.

C. What Will Be Discussed

This paper will be constituted of the following sections dealing with various aspects of evidence by expert witnesses:

- Expert's qualifications

- Relevance
- Reliability
- Rules restricting evidence
- The expert's report

D. A Note on Pronouns

I will refer to the trial attorney as a lady and the expert witness as a gentleman, although we all know that not all attorneys and experts are ladies and gentlemen. Thus the male pronoun will always refer to the expert witness and the female pronoun to the attorney.

II. EXPERT'S QUALIFICATIONS

A. General Qualifications in the Field of Endeavor

1. The Applicable Rule: The Five Factors

The first part of Federal Rule of Evidence 702 provides:

Testimony by Experts: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion... [Emphasis added.]

Five ways of qualifying are given, but the essential is that specialized knowledge must be shown. Thus in *Longoria v. McAllen Methodist Hospital*, 771 S.W.2d 663 (Ct App. Tex. 1989); reversed after remand, *Longoria v. United Blood Services*, 907 S.W.2d 605 (Ct App. Tex. 1995); reversed and rendered, *United Blood Services v. Longoria*, 938 S.W.2d 29 (TX 1997), both the relation of the other four ways and the trial court's wide discretion are expressed. In 907 SW2 605, at pages 612-613, the proponent's burden to show the proffered expert to be qualified is to prove:

[H]igher degree of knowledge than an ordinary person or the trier of fact...This burden may be met by showing that the expert is trained in the science of which he or she testifies or has knowledge of the subject matter of the fact in question...Generally, however, there are no

definite guidelines to determine whether a witness's education, experience, skill, or training qualifies the witness as an expert, and such a determination is left to the trial court's discretion.

2. The Biggest Word: The Little "or"

Courts have ruled that use of the word "or" makes the five ways of Rule 702 completely disjunctive. An expert need qualify only under one of the five, provided such satisfies the trial judge, which is a very large and problematic proviso. Thus *72 Criminal Law Reporter*, 548-9 (March 19, 2003), reports regarding *U.S. v. Frazier*:

Qualification of an expert does not depend on a scientific background, the majority stressed... [T]he Supreme Court extended *Daubert*'s application from "scientific testimony" to "all expert testimony" so that science is no longer the sine qua non of analysis under *Daubert*. This makes sense, the majority noted, in view of the disjunctive language of Rule 702.

See: *U.S. v. Frazier*, judgment of trial court vacated and case remanded for new trial, 322 F.3d 1262 (11 Cir 2003); opinion vacated and hearing in blanc granted, 344 F.3d 1293 (11 Cir 2003); affirming judgment of trial court, 387 F.3d 1244 (11 Cir 2004).

The various states of the Union that have the same wording in their Rules of Evidence as do the Federal Rules of Evidence have the same interpretation. For example, *Carter v. State*, 5 S.W.3d 316 (TX App. Houston 1999), at page 319 states:

Although we have not found a decision from the Texas Court of Appeals, we have found numerous cases from the federal courts stating that a witness may be qualified on the basis of only one of the five qualifications listed in Rule 702—including practical experience.

Seven federal illustrative cases are cited. Footnote 2 observes that "the Texas Court of Criminal Appeals has approved the practice of interpreting Texas Rules in accordance with Federal Rules where the wording is the same."

The bottom line is whether or not the trial judge has been persuaded that the proffered expert witness definitely knows what is needed to be known to help resolve the expert fact in issue.

3. How to Satisfy the Five Factors

An attorney should be sure that her expert witness has a segment on his CV explicitly covering each of the five ways to qualify. A prudent expert will then pursue what he is weakest in. Knute Rockney, the most famous coach of American football at University of Notre Dame, was once asked why his teams were so strong. He replied that they identified their weakest point and worked on it until it became their strongest point.

B. Specific Qualifications in the Fact in Issue

1. The Balance of Rule 702

The rest of Rule 702 states:

[O]r otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This wording was added to Rule 702 to incorporate the provisions of *Daubert* and its progeny. In the qualifications phase, the attorney should show her expert can do all this. He should then proceed during his testimony-in-chief to do all the attorney set forth.

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 US —, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999), reversing *Carmichael v. Samyang Tire, Inc.*, 131 Fed.3d 1433, the U.S. Supreme Court states at page 1177:

As we said before...the question before the trial court was specific, not general. The trial court had to decide whether this particular expert had sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case.

After the expert sufficiently meets the five ways for generally qualifying in his discipline, the trial judge must be satisfied he also qualifies in the spe-

cific expert fact in issue to be addressed.

2. An Example of Specificity

First, the expert fact in issue that is to be addressed must be clearly defined. It is one thing to show a handwriting expert can identify ordinary signatures, but it is quite another thing to be able to identify, for example, the signature of a patient with Alzheimer's. The ability to write will change as the illness advances until the signature can only be written in slavish imitation of a model the Alzheimer's patient is told to copy. Eventually the ability to write disappears. To testify to such signatures, one must show familiarity with the relevant research and be able to explain clearly the graphic dynamics through the various stages of their deterioration due to Alzheimer's.

In 29 *Journal of Forensic Sciences*, "Alzheimer's Disease and Its Effect On Handwriting," 8791 (Jan. 1984), James E. Behrendt states at page 89:

As the disease progresses all patients eventually lose the ability to write...Just before complete loss of writing ability an Alzheimer's patient will reach a condition where he or she will be unable to write or sign their name on command. If the name is placed before the patient, however, the patient will proceed to write.

3. Demonstrating Specificity

Second, the expert should survey his entire background for data directly related to the specific expert fact in issue. These then tell the attorney what questions to ask in qualifying the expert witness. To show one knows how to do what needs to be done, testimony as to previous case experience re Alzheimer's, attendance at seminars teaching the matter, papers published, and presentations given on the topic should carry the burden of proof, provided it is all true.

4. Being Prepared

Even before being engaged to perform specialized work, the expert should fill in lacunae in the fives ways of Rule 702. The prudent expert will actively pursue new knowledge and skill in his

field so that there is less chance that a new commission will find him perplexed.

5. Not Overstepping Oneself

However, even the most knowledgeable expert cannot honestly meet the requirements for all issues that might arise. Ethics require that one refer any work that is beyond one's competence to a well qualified colleague.

6. Case Illustrations

Two cases about admissibility of expert testimony as to writer of graffiti illustrate how specificity in laying a foundation can make all the difference.

In *Bryn, et al., v. Bryn*, 2004 Conn. Super. LEXIS 2676 (Conn. Super. Ct. 2004); 2005 Conn. Super. LEXIS 2713; affirmed, 944 A.2d 442 (Conn. App. 22, 2008). At page [*8] of 2005 Conn. Super. LEXIS 2713, we read:

Peggy Kahn, the handwriting expert, confirmed that [Defendant] Roger was the author of the graffiti at the Old Greenwich railroad station. She clearly pointed out several identifying characteristics in the graffiti which she identified as consistent with the defendant's writing style.

To the contrary, in *People v. Michallon*, 201 A.D.2 915, 607 NYS2 781 (NY Supreme Ct 1994), the expert should not have been permitted to testify. In 607 NYS2 781, at page 783, the Court of Appeals says:

[T]he court erred in admitting opinion testimony by the People's handwriting expert that spray paint writing on the victims' vehicles corresponded to defendant's handwriting. The People failed to make the threshold showing that comparing handwriting to spray paint writing is scientifically reliable.

The expert failed to be familiar with published research showing how such comparison can be reliable if done correctly. It is charity that the case report does not name the expert.

III. RELEVANCE

A. The Applicable Rules

Federal Rule of Evidence 401 states:

Definition of “Relevant Evidence”: “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403 states when the relevant may not be admissible:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

B. Mostly the Lawyer’s Job

I believe the attorney is primarily responsible to be sure her expert witness satisfies all that is needed to fit comfortably under Rule 401’s definition of “relevant” as well as not being tainted with anything resembling any of Rule 403’s grounds for exclusion. However, experience taught me long ago that the attorney is so overly burdened with all the minutiae and onera of litigation that full faith in her expert witnesses is a necessity for psychological survival. Therefor, I firmly believe the expert must master these things as a matter of course, bringing to the attorney’s attention what is beyond the capacity or authority of the expert. We serve others best by lessening their burdens as much as possible.

C. How the Examiner Can Contribute to Satisfying the Rules

1. *First Things First*

The expert must understand what are the exact fact(s) he is asked to prove. This harkens back to Section II, Subsection B, Paragraph 2: ‘First, the expert fact in issue that is to be addressed must be

clearly defined.’

2. *Unfair Prejudice*

To give one example, the expert must understand how exemplar documents or demonstrative evidence can unfairly prejudice the opposing party. Among other causes of unfair prejudice is violation of a party’s legal or constitutional privilege. Sometimes the unfair prejudice will make the expert testimony inadmissible, while at other times the expert is saved by an alternative expedient.

Alexander v. State, 759 So. 2d 411 (MS 2000), illustrates how an initial violation of the spousal privilege is avoided in the final testimony. Appellant was convicted of capital murder and sentenced to life without parole. Among other asserted errors, appellant argued that the State’s handwriting expert, A. Frank Hicks, had improperly used as exemplars some letters that Alexander wrote to his wife.

However, the Supreme Court of Mississippi states in its ruling, 2000 Miss. LEXIS 104, starting at [*23]:

P34. While the admission of any information contained in Alexander’s letters [*24] to his wife would have posed a privileged communication problem, the expert’s mere reliance on the letters for handwriting purposes poses no such evidentiary bar. In the latter instance, the expert is not concerned with the actual information contained in the letters; rather, he is concerned with the manner in which the letters and words are formed—the actual handwriting. The content of the privileged letters was not introduced into evidence; and therefore, there was no violation of M.R.E. 504(b). Though unnecessary, the essence of the problem was avoided when the handwriting expert altered his testimony to express opinions unrelated to the documents in question. Today’s ruling is consistent with other jurisdictions. [Citations omitted.]

3. *Confusion of Issues*

The expert must focus his work product precisely on the facts he was asked to prove. This is

the safest way to assure there is no wandering into forbidden pastures.

Application of this rule is well illustrated in *State v. Smark*, 1999 Ohio App. LEXIS 2989 (OH Ct App. 1999). Defendant appealed Trial Court's ruling that her handwriting expert, Vickie Willard, could not testify before the jury that Defendant did not sign the false signature to a prescription form. Since the charge was knowing possession and uttering of a false prescription, not the forging of it, Willard's testimony would confuse the jury as to what was charged and the dangers outweighed the probative value.

4. Misleading the Jury

In *U.S. v. Solano-Rodriguez*, 173 F.3d 865 (10 Cir. 1999), defendant's proffered linguistics expert, Dr. Daniel Villa, was not allowed to testify that a border patrol agent could not conduct a basic conversation with defendant in Spanish and that the defendant could not converse with the agent in English. The agent testified to having no difficulty conversing with defendant in English and that his suspicions were aroused, leading to search of her car and discovery of marijuana. Among other concerns was the likelihood of the expert linguistic evidence misleading the jury.

5. Undue Delay, Waste of Time

Reports, testimony, and other expert evidence should be as pithy as the problem permits and emphasize the unique contribution the expert is making. This will anticipate assertions of undue delay or waste of time. However, *Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286, 895 A.2d 405 (NJ 2006), shows that at times it is beyond the expert's best efforts.

Defendants sought to admit the testimony of John Paul Osborn, a handwriting expert, who would have testified that Leman Lane's signatures on plaintiff's insurance forms were probably forged. This testimony was excluded on the ground that it would take an excessive amount of time and result in a "little forgery trial within the sexual discrimination trial."

6. Cumulative Evidence

Denial of a new trial was affirmed in *U.S. v. King*, 49 Fed. Appx. 111 (9 Cir 2002). King contended that the opinion of a handwriting expert given after trial constituted newly discovered evidence warranting a new trial. At best, the new opinion was cumulative of other evidence given at trial, and so it did not constitute new evidence.

IV. RELIABILITY: WHAT DAUBERT SAYS, NOT WHAT SOME SAY IT SAYS

A. The Good Intention: A More Liberal Policy of Admitting Expert Evidence

The *Daubert* decision was meant to make it easier to present expert evidence at trial by allowing more than one gate to admissibility. *U.S. v. Crisp*, 324 Fed.3d 261 (4 Cir 2003); cert. denied, *Crisp v. U.S.*, 157 L.Ed.2d 159, 121 S.Ct. 220 (US 2003), brings this out nicely. Both fingerprint and handwriting identification evidence were challenged on appeal on basis of abuse of discretion in admitting them, asserting neither met *Daubert* factors other than general acceptance. While in jail, Crisp tried to pass a note to an accomplice saying what story he should give about the robbery. Thomas Currin, handwriting expert, identified Crisp as writer of the note. In 324 Fed.3d 261, at page 268 the Fourth Circuit Court of Appeals states:

The *Daubert* decision, in adding four new factors to the traditional "general acceptance" standard for expert testimony, effectively opened the courts to a broader range of opinion evidence than was previously admissible. Although *Daubert* attempted to ensure that courts screen out "junk science," it also enabled the courts to entertain new and less conventional forms of expertise.

So much for what *Daubert* actually provided. Certain critics of forensic expertise fabricated the theory that every proffer of expert evidence had to satisfy all *Daubert* factors. Additionally, they ignored the repeated assertion by the U.S. Supreme Court that the *Daubert* factors were guidelines and that an alternative set of criteria could be used in

a particular case if shown to be reasonable. In repeating their theory in face of all reality, the critics managed to have it generally accepted, thus creating weapons for excluding an opponent's valid and reliable expert evidence, and thus negating the intent to provide more liberal ways to enrich trials with cutting-edge developments in science and technology.

B. Reliability: How Reliable Is the Definition?

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), the syllabus at page 475 summarizes the process for determining reliability of proffered expert evidence:

Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate.

1. Do We Have a Definition?

But what precisely is "legal reliability?" Neither *Daubert* nor its clarification in *Kumho* offers us a reliable definition of "legal reliability." You might wish to skip the catalog of non-clarifying clarifications given in Item 2 below, and simply accept its being equated to two other terms, neither of which helps.

First, it is said to equate to "scientific validity." However, although all expert testimony must be shown to be reliable, only the kind based specifically on scientific principles need show scientific validity. Therefore, legal reliability cannot equate to scientific validity, since the scope of the former is much broader.

Second, the Court said legal reliability equates to trustworthiness. However, "trustworthiness" is

never defined. Every trial judge can comfortably settle into a personal definition of "trustworthiness," and the courts of appeal can have theirs, and all the while everyone can pretend we all use the same definition. Courts at any level may then without abuse of discretion justify any ruling on admissibility based on any of the multiple, amorphous definitions one can possibly give to "trustworthiness."

2. A Catalog of Non-clarifying Clarifications

The Summary in *Daubert* at page 460 states that, in a federal case involving scientific evidence, evidentiary reliability is based on scientific validity. Arguably most expert evidence does not involve scientific evidence. So might we infer something the Court never says, that evidentiary reliability is based on a demonstrated and pertinent validity of some unspecified sort? Headnote 3 states:

Rule 702's requirement that an expert's scientific testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability, that is, trustworthiness.

However, expert testimony need not be scientific nor have a scientific predicate. This is just one aspect of reliability that was not sorted out rationally by the Court. Rationality requires a definition of legal reliability that would apply equally to all types of expert testimony. Additionally, "trustworthiness" is never defined within this context. At page 481 we read:

Proposed testimony must be supported by appropriate validation, i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Later the science is inferred not to be a universal requirement since all expert testimony, scientific, technical and specialized, must be equally shown to be legally reliable, and thus expert testimony is not limited to scientific knowledge.

Also at page 481, footnote 9 states:

We note that scientists typically distinguish between “validity” (does the principle support what it purports to show?) and “reliability” (does application of the principle produce consistent results?)...[O]ur reference here is to *evidentiary reliability*—that is, trustworthiness.... In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*. [Emphases in original.]

Unfortunately, this definition of scientific reliability means that an incorrect application of a scientific principle that consistently gives the same incorrect result is reliable. But then there are experts, I suppose, who can be relied on to give unreliable opinions and do so consistently. America's Fred Zain comes to mind. Prosecutors found him very reliable when competent experts said the evidence simply did not prove defendant guilty. He gave prosecutors the evidence they needed to win when the truth was an encumbrance to conviction.

At page 485 the *Daubert* Court states:

To summarize: “General acceptance” is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

Now turning to *Kumho Tire Co., Ltd. v. Carmichael*, 526 US —, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999), reversing *Carmichael v. Samyang Tire, Inc.*, 131 Fed.3d 1433, we fare no better in our quest for a reliable definition of “legal reliability.” *Kumho* clarified *Daubert*, but unfortunately in this matter it did so with the same lack of clarification. In *Kumho* the Supreme Court states at page 1169:

The *Daubert* “gate keeping” obligation applies not only to “scientific” testimony, but to all expert testimony. Rule 702 does not distinguish between “scientific” knowledge and “techni-

cal” or “other specialized” knowledge, but makes clear that any such knowledge might become the subject of expert testimony. It is the Rule’s word “knowledge,” not the words (like “scientific”) that modify that word, that establishes a standard of *evidentiary reliability*.

So we can ignore all the previous clarifications of “evidentiary reliability” that referred to scientific criteria, and still be at a complete loss since there is no guidance to distinguish between the kind of knowledge that qualifies as expert versus any other kind of knowledge.

Immediately after the above passage, the Court adds experience to knowledge as a basis for showing reliability. If either will do, might a well-experienced ignorant person pass muster?

Then at page 1170 we are told:

In determining whether particular expert testimony is reliable, the trial court should consider the specific *Daubert* factors where they are reasonable measures of reliability.

Are we now told these factors might just as well be on occasion unreasonable measures of reliability? There is no guidance as to how one is to distinguish between occasions of their reasonableness versus their unreasonableness. All the gifts we thought were securely under our litigational Christmas tree have been nullified on some unspecified occasions.

All in all, *Kumho* uses 90 instances of various forms of the word “reliable,” yet there is no assurance any use is reliable, since the Court gives no clear, precise definition of what it means as a legal term. Saying it equates to “trustworthiness” is useful only if “trustworthiness” is given a precise and clear definition. And equating it with “scientific validity” is of no help since nonscientific expert testimony must be as trustworthy as scientific expert testimony, yet it concededly does not need to have any scientific basis.

Given such a lovely muddle, legal scholars and courts of law speak as if they all know precisely what “reliability” and its related terms mean. How-

ever, no one asks for a clear clarification, merely accepting the unclear clarifications. It is a legal application of the principle abandoned by the U.S. Armed Forces: Don't ask, don't tell!

The wonder is that the practical guidelines that the Federal Rules of Evidence provide in the wake of *Daubert* and its progeny can assure that expert evidence is reliable, whatever definition one uses or fails to use.

C. Tested: Meaning “Falsifiability, or Refutability, or Testability,” Come Again?

Chief Justice Rehnquist, with whom Justice Stevens joined, concurring in part and dissenting in part, stated at page 487 of *Daubert*:

The Court then states that a “key question” to be answered in deciding whether something is scientific knowledge “will be whether it can be (and has been) tested” *Ante*, at 593, 125 LEd 2d, at 482-483. Following this sentence are three quotations from treatises, which not only speak of empirical testing, but one of which states that the “criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.” *Ibid.*

I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its “falsifiability,” and I suspect some of them will be, too.

Not a single one of the *Daubert* criteria is “falsifiable.” Nor refutable, nor testable. So whatever these terms might mean, they mean that the criteria for legal reliability are unreliable. If one considers them as criteria for establishing the scientific status of any principle or method in science, then science is essentially unscientific. Yet they can get the job done to everyone’s satisfaction. We just all must agree to let science do with a judicious bit of the irrational and illogical, which will nicely humanize it. Additionally, although many scientists take themselves terribly seriously, the rest of us can take them a bit lightly.

D. Peer Review and/or Publication

This factor especially teaches us how all criteria can be manipulated to persuade the trial judge to include our evidence and/or exclude opposing evidence according to our particular bias.

1. Peer Review: A Cautionary Tale

293 *Science*, “Peer Review and Quality: A Dubious Connection” 2187-8 (Sept. 21, 2001), reports a preliminary research enquiry into scientific medical journals with peer review for acceptance of papers for publication versus those with editorial review only. At a scientific meeting, two researchers presented a preliminary survey on this issue. Results showed that papers with enduring scientific value came equally from peer-reviewed and editor-reviewed publications. They proposed that editors cooperate for a properly designed, large scale research. Editors of editor-reviewed publications accepted the proposal, while those of peer-reviewed publications said no. They would continue with what they had always done, there being no need to learn whether there was objective value in it.

Then came the report in 309 *Science*, “Suggesting or Excluding Reviewers Can Help Get Your Paper Published,” 1974 (Sept. 23, 2005). Authors of papers complained their papers were rejected for publication in peer-reviewed journals. Solution? They demanded, and were granted, the right to know who the peer reviewers were, to veto one or more of them, and to have their own selections for peer reviewers placed on the journal’s panel. Would you be surprised that this peer review of one’s peer reviewers significantly improved one’s chances of being published?

2. And/or

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), stated at page 477:

The [Ninth Circuit Court of Appeals] emphasized that other Courts of Appeals considering the risks of Bendectin had refused to admit

reanalyses of epidemiological studies that had been neither published nor subjected to peer review. 951 F2d, at 1130-1131.

This clearly shows that peer review does not equate to its subset, publication. Nevertheless, the myth has arisen that one need only consider peer-reviewed publications.

Board of Forensic Document Examiners has this as part of what is considered for recertification as stated at their web site, <http://www.bfde.org/recertification.html>:

Professional contributions [sic] are given for donating time for the good of the profession. Activities include such things as: serving as an officer in a professional association, chairing a symposium, participating on committees, working on a professional journal, publishing in a peer-reviewed journal, presenting research or technical papers at conferences. [Emphasis added.]

Presumably, however fine the paper or prestigious the journal, if it is not peer-reviewed it will not count.

3. Publication

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), explains at page 483:

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a sine qua non of admissibility; it does not necessarily correlate with reliability...The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

Clearly, if publication in a peer-reviewed journal, or the lack thereof, is not dispositive, it is at least unreasonable, if not irrational, to make peer-reviewed publication a forensic idol before which

one makes dispositive immolations of experts having “the lack thereof.”

An example of how an entire expertise can be rejected by a dearth of publications is *U.S. v. Van Wyk*, 83 FS2 515 (D. NJ 2000); 2001 U.S. App. LEXIS 6290 (3 Cir 2001); certiorari denied, 534 U.S. 826, 122 S. Ct. 66, 151 L. Ed. 2d 33 (US 2001). In 83 FS2 515, at page 521, it is described how Gerald McMenamin’s first book was cited by the government to support reliability, but the trial court gives this assessment:

Due, however, to the dearth of published cases or journals addressing forensic statistics, the novelty of this field, and the fact that it has only been approved by law enforcement, the Court has no way of determining whether the McMenamin article is merely self-legitimized.

Since then others, such as Dr. Carole Chaski of Georgetown, DE, have authored published research reports. See, for example, *Classification Society of North America Proceedings*, “Discriminant Function Analysis in Forensic Authorship Attribution” (June 2005). In describing the scope of the paper, the author says on the first page: “Section 4 presents the results of several experiments using cross-validation within discriminant function analysis of punctuation and syntactic feature sets, illustrating that the currently optimal method has an overall accuracy rate of 95%.”

Dr. Chaski has provided an overview of the forensic linguistic literature in its variety with a bibliography of 33 publications in “Author Identification in the Forensic Setting.” This paper is a chapter in *Oxford Handbook of Forensic Linguistics*, Lawrence M. Solan and Peter M. Tiersma editors, New York: Oxford University Press, 2012.

4. Learned Treatises

Federal Rule of Evidence 803 provides:

Hearsay Exceptions; Availability of Declarant Immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

This passage should steer anyone clear of the misconception that only peer-reviewed publications matter. At least pamphlets have not yet been subjected to peer review. Therefore, the expert must have familiarity with both those authors and writings he relied on and those generally esteemed by a segment of his profession. All can be fair grist for the mill in which one is ground during cross-examination.

E. Rate of Error

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), states at page 483:

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, e.g., *United States v. Smith*, 869 F2d 348, 353-354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation, see *United States v. Williams*, 583 F2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), cert denied, 439 US 1117, 59 L Ed 2d 77, 99 S Ct 1025 (1979).

An example of how one can run afoul of this factor is shown in *Williams v. State*, 936 S.W.2d 399 (Ct App. Tex. 1997). At page 402, the expert could not name the precise literature supporting her work, and as to rate of error she said that the instrument will work or it won't, but as long it is calibrated

“there's not really that much error.” (Let's hear it for scientific precision!) No evidence was offered as to statistical variability, nor to learned treatises containing the method, nor to a known rate of error, nor to relevant peer review.

Forensic handwriting expertise has long had something I consider far better than a rate-of-error study. Beginning with Albert S. Osborn, authors in the field have published sources of error in handwriting identification. It does scant good to know a forensic discipline enjoys an admirable array of research reports showing very low rates of error. What will be of benefit is a tool to find out whether *this* expert may have made an error. These various lists of sources of error in handwriting identification are ideal for such an enquiry. Neglect of only one such source of error might impeach an opposing expert. For the conscientious examiner, these lists can provide a thorough means of reliability testing of one's own opinion before issuing it.

Nevertheless, forensic handwriting examination has enjoyed excellent research reports on rate of error, and not just recently. Most of these studies were designed to find out something else, such as whether the product of photocopy machines could be relied on for accurate observations and, if so, what their limitations might be. By and large the reports generally stated that participating handwriting experts achieved accuracy of observations above 90% in the most difficult situation they face professionally.

For example, Greg A. Dawson and Brian S. Lindblom report research in reliability of photocopies for determining features of line quality in signatures, *38 Science and Justice*, “An Evaluation of Line Quality in Photocopied Signatures,” 189-94 (1998). A group of handwriting experts from Canada, America, Australia and United Kingdom had a cumulative error rate below 5% in reporting features of line quality in original ink signatures by examining photocopies, arguably the most difficult observation to make. The authors did not intend to make a rate-of-error study, but they made an excellent one.

Individuals who successfully participate in com-

petency testing programs are considered to have demonstrated their own low rate of error.

F. Standards of Performance, a Subset of Rate of Error

Professional organizations can establish voluntary standards for a discipline. The now defunct Subcommittee E30.02 for questioned documents of American Society for Testing and Materials International (ASTM) set such voluntary standards in questioned document examination. An examiner who does not follow these standards had better have a very compelling explanation why not. The standards provide the attorney with excellent materials to test the credibility of her own expert and a thorough means for cross-examining the opposing expert.

Another important set of standards are codes of ethics. Every professional organization has some kind of code of ethics. Typically these set forth not only guidelines for conduct of business and professional relations but also performance of work. National Association of Document Examiners has its code of ethics readily available for anyone to download at <http://www.documentexaminers.org/ethics.shtml>. When asked for opinions on the professionalism and competence of opposing examiners, members have testified that this code of ethics makes it unethical for them to offer such opinions. They are restricted to technical replies to opposing opinions and the reasons for such opinions. In this way all professional standards, not just codes of ethics, can protect experts from requests to perform improper services.

G. General Acceptance

Prior to 1993, general acceptance was virtually the universal standard for admission of expert evidence in American courts. It was all so simple and straightforward. When in its *Daubert* decision the U.S. Supreme Court stated that the Federal Rules of Evidence had set reliability as the standard of admission, things became quite other than simple and straightforward. From being of one mind on this issue, America's Goddess Justice developed a

split personality with further fragmentation in her *Daubert* persona.

The seventy-year solo reign of general acceptance began with *Frye v. United States*, 54 App. DC 46, 293 Fed. 1013, 34 A.L.R. 145 (Ct. App DC 1923). The Federal Court of Appeals for the District of Columbia ruled that evidence of deception or honesty in statements as measured by systolic blood pressure had not gained general acceptance among physiologists and psychologists and so was inadmissible. This case report provides no citations to earlier cases establishing the rule of general acceptance, which thus is referred to as the "Frye rule" or "Frye test." However, it has been cited innumerable times by both federal and state courts as authority.

Some states, such as California, still adhere to the *Frye* rule, though most states have adopted rules of evidence based on the Federal Rules of Evidence and have for the most part adopted *Daubert* as their ruling authority.

For states still following *Frye*, once a technique or scientific principle has passed muster with the general acceptance test, it is generally considered free from further challenge. Thus, the test is reserved for novel scientific or technical evidence that has not yet found admittance as having been proven to be generally accepted in its particular field. However, an individual expert can still be challenged on his application of the relevant theory or method.

The *Frye* test is not abandoned under the Federal Rules of Evidence; it just has to share equal honors with four other ways by which expert evidence can be proven reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), states at page 483:

Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *United States v. Downing*, 753 F2d, at 1238. See also 3 Weinstein, & Berger ¶

702[03], pp 702-41 to 702-42. Widespread acceptance can be an important factor in ruling particular evidence admissible, and “a known technique which has been able to attract only minimal support within the community,” *Downing*, 753 F2d, at 1238, may properly be viewed with skepticism.

1. General Acceptance Does Not Have to Be Too General

In *People v. William Michael Leahy*, 8 Cal. 4th 587; 882 P.2d 321; 34 Cal. Rptr. 2d 663 (1994 CA), the Supreme Court of California reiterated its adherence to the *Frye* standard of general acceptance for admission of novel scientific evidence. It stated the nature of general acceptance this way:

First, we should make clear that “general acceptance” does not require unanimity, a consensus of opinion, or even majority support by the scientific community.

It did not make particularly clear at what point acceptance becomes general.

2. The General Views on General Acceptance: Generally Incorrect

All the other *Daubert* criteria were established only by general acceptance, which is now the ugly duckling of the clutch, but without promise of becoming a recognized swan. To my knowledge, there was no pre-*Daubert* scientific research proving their reliability as criteria of reliability to support their adoption as such. As we saw above, peer review was never tested, much less peer-reviewed, only generally accepted by peer reviewers.

V. RULES RESTRICTING EVIDENCE

A. The Applicable Rule

See subsection A of Section III, Rule 403.

B. Underlying Data

Federal Rule of Evidence 703 states:

Bases of Opinion Testimony by Experts. The facts or data in the particular case upon which an expert bases an opinion or inference

may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

The case *U.S. v. Lewis*, 220 F. Supp. 2d 548 (S.D. WV 2002); affirmed, 75 Fed. Appx. 164 (4 Cir 2003), shows that the expert witness must be knowledgeable of sources if his reliance on them is to be reasonable. In 220 F. Supp. 2d 548, at page 554, the court explains:

In sum, Mr. Cawley could not testify about the substance of the studies he cited. He did not know the relevant methodologies or the error rate involved in these studies. His bald assertion that the “basic principle of handwriting identification has been proven time and time again through research in [his] field,” without more specific substance, is inadequate to demonstrate testability and error rate.

It also helps to have actually used what was supposedly relied on. Thus, *Green v. State*, 55 S.W.3d 633 (Ct Ap Tyler TX 2001), offers several criticisms of the witness in “false confession expertise.” Of interest here is that there was no indication that psychologist Thomas Allen had relied upon or utilized the research or techniques of the authors he had described.

In contrast to these two cases is *Farmers State Bank of Northern Missouri v. Huffaker*, 2009 Mo. App. LEXIS 442 (MO App. 2009). A Mrs. Huffaker claimed three areas of unreasonable reliance by handwriting expert Storer:

- There was no evidence that the material he relied on was the type of material that is reasonably relied on by experts in his field;
- There was no evidence to establish that the ex-

emplars used by Storer contained Huffaker's signature; and

- Storer impermissibly relied on a lay witness's opinion as to handwriting.

The Court of Appeals said all objections had been satisfied, and so he was properly permitted to testify.

C. Examiner's Role in Satisfying Each Provision Individually

See Section III, Subjection C, where this was discussed and illustrated.

VI. EXPERT'S REPORT: THE RULE FOR CIVIL CASES.

A. The Applicable Rule: United States Code, Title 28a, Rule 26

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26 (a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previ-

ous ten years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

The appendix to this article gives a model outline for a report with provision for all the required elements.

B. Satisfying Each Requirement of Rule 26

Every expert witness should have proper, updated documents on qualifications in his computer files and a form/sample report with all required divisions. Generally the expert would want to use the same format each time, adjusting it for special situations.

1. A Complete Statement of All Opinions the Witness Will Express and the Basis and Reasons for Them

If there is no reliable basis for an expert opinion, it is itself unreliable. Thus in *Scott Doe v. Kohn, et al.*, (Fed Dist Ct Philadelphia 1993), for lack of any technical basis defense expert Gus Lesnevich was barred from testifying that a tear in paper indicated erasure with overwriting. In the same case he was barred from identifying the person making scratch-outs over a signature. Case law requires similar scratch-outs by the person for comparison, while he used the underlying signature which was a different thing from scratch-outs so that the two could not be compared for purposes of identification. If the expert witness has a reliable theoretical basis that meets both technical and legal requirements but does not state it, the effect is the same as not having one, so that upon proper motion by the opposing party the expert's testimony can be barred.

2. The Data or Other Information Considered by the Witness in Forming the Expert Opinions

Not only must one give the data upon which the

opinion is based, but it must not be inaccurately interpreted as Professor Michael J. Saks did in *U.S. v. Hidalgo*, 229 FS2 961 (D.C. AZ 2002). At page 965, the judge discusses Saks's interpretation of research studies by Professor Moshe Kam:

[Saks] claims that while most non-professionals performed poorly, a few performed as well as professionals. He contends that this shows that those nonprofessionals were motivated while others were not, and that motivation positively correlates with outcome. We do not agree. The worst professional made two errors. The best non-professionals made about nine errors, while the worst nonprofessional made about forty-four errors. Even the worst professionals clearly outperformed the best non-professionals.

Because of this lack of reliable data for Saks's opinion, among other reasons, the defense motion to have ruled inadmissible the government's handwriting expert, William J. Flynn, was denied. However, due to failure of the government to present sound data of its own, Flynn was not permitted to express an opinion as to genuineness or falsity, but only to present his expert observations to the jury.

3. Any Exhibits That Will Be Used to Summarize or Support the Expert Opinions.

In a federal district court civil case where I was plaintiff's expert, the defense counsel declined to depose me or request my reports. However, one morning, less than a week before trial, they rightly requested statement of all opinions I would testify to with anticipated trial exhibits. I suggested the law office simply send to them my reports that contained it all. That afternoon they offered a settlement. This is the result hoped for in the federal rules about reports and disclosure.

4. The Witness's Qualifications, Including a List of All Publications Authored in the Previous 10 Years

For this I simply maintain a complete list of all

professional publications from the very first. If an expert witness has written and published something impeachable, then one can only hope and pray that ten years come much sooner than that. The remedy is to write and publish wisely.

5. A List of All Other Cases in Which, During the Previous Four Years, the Witness Testified as an Expert at Trial or by Deposition

The attorney advisedly would subscribe to a service that maintains a record of testimonies by experts. One individual was roundly criticized by a judge for participating in an ink expert's spoliation of an original document in the court files without obtaining the court's permission or notifying the opposing party. Though he had testified, the expert did not include the case in his list of testimonies and was never caught on the omission until the four-year limitation had passed. A judicious bit of research by opposing attorneys before cross-examining him would have eventually uncovered the omission.

6. A Statement of the Compensation to Be Paid for the Study and Testimony in the Case

This is best satisfied by including, as an exhibit to the report, a copy of the expert's current fee schedule, and stating the amounts already invoiced to the client along with estimated time for future work.

C. Examples of Special Situations

There are situations where the rules require particular features in an expert's report in the form of an affidavit or declaration under penalty of perjury. When an affidavit is required in federal district court, or a state trial court following Federal Rules, the affiant must be sworn before a notary public who signs, then stamps or seals the jurat. There is a particular wording required.

The following are offered as illustrative of the many special situations and their particular rules.

1. Affidavit in Support of, or in Opposition to, Motion for Summary Judgment

Federal Rules of Civil Procedure provide in Rule 56, Summary Judgment, as follows:

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion...

(c) Procedures...

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

A state court case in point is *In the Matter of the Last Will and Testament of Ernest W. Smith, Deceased: Smith v. Smith*, 910 So. 2d 562 (MS 2005). In an effort to set aside a deed, a report by handwriting expert Richard Orsini was filed two years after the motion for summary judgment, but an affidavit was never obtained from him. Summary judgment was properly granted, and Orsini's report was correctly not considered. Knowing Mr. Orsini to be competent and conscientious, I assumed he had never been informed as to the use that would be made of his report nor properly instructed on its format. He confirmed to me that such was the case.

2. Back-up to Another Expert

An attorney might have a nagging feeling that her expert's evidence is less than weighty, so the supporting affidavit of another expert is offered. This, however, must be relevant and more than mere bolstering. If the first expert's affidavit or testimony fails acceptance, the second would likewise fail as not relevant to an issue in fact or law. This is nicely illustrated in *Dracz v. American General Life Insurance Co.*, 426 F.Supp.2d 1373

(M.D. GA 2006).

The handwriting fact in issue was whether the "Yes" or "No" answer box for a question on an insurance application form had been checked first and who marked the other if not plaintiff. Plaintiff called Curtis Baggett "who examined a copy of Dracz's insurance application and reached an opinion regarding the author and the sequencing of the marks in Question 5's check boxes." Upon defendant's motion in limine Baggett was ruled not qualified to testify. Further, even if he had been found qualified, his method was unreliable, and so he would still have been inadmissible. Don Lehew, a colleague of Baggett's, submitted an affidavit, the sole purpose of which was merely to bolster Baggett's credentials and report. Since Baggett was disqualified, defendant's motion to strike Lehew's affidavit was moot.

3. Grand Jury

One must watch for particular situations that occur rarely or for rules that might vary from one jurisdiction to another and from time to time. The case *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3 Cir 1973), referred to as *Schofield I*, gives rules for at least the district courts under the federal Third Circuit Court of Appeals, for at least that time period. The government must make a preliminary showing in affidavit on handwriting exemplars to be taken for use in a grand jury hearing. The affidavit must state that the exemplars are relevant to the grand jury's inquiry, properly within the grand jury's jurisdiction, and not sought primarily for another purpose. The affidavit should be disclosed to the witness who will have to give the exemplars. If an exemplar proves not relevant to the grand jury's inquiry, the witness may request the same be destroyed or returned.

D. Testimony Limited to What Is in the Report

This is illustrated by *Malachinski v. Commissioner of Internal Revenue*, 268 Fed.3d 497 (7 Cir 2001). We read at page 501 that Malachinski's expert, Diana Marsh, "as a board-certified forensic document examiner," failed to include in her

report “the facts, data, and analysis that form the basis for an expert’s conclusion,” and so she was properly not permitted to testify to them.

An expert must be assiduous in finding out the requirements of the rules for expert note-taking, reports, testimony and other aspects of the work. One cannot rely on the attorney/client to provide all such information. The discounting of the expert’s opinion for some neglected technicality can come back to haunt the expert, not the attorney/client. See the case of *Deputy v. Lehman Brothers, Inc.*, 345 F.3d 494 (7 Cir 2003), where the *Malachinski* case came back to haunt Ms. Marsh. By including in the report all the elements discussed in this paper, an expert need not fret over this rule.

VII. CONCLUDING REMARKS

The following remarks may have other authority than my own experience, yet they are none the less deeply felt and earnestly offered.

A. Don’t Come Cry on My Shoulder Afterwards

Colleagues have reported their anguish at facing a serious challenge to their qualifications or admissibility at the last moment before the hearing. At 78 years of age I have learned not to feel sorry even for myself in such situations, no matter the angst rising in the soul. The time for case-specific preparation is the moment when one is first informed of the challenge. The time to begin general preparation is the unchallenged present, as in this very moment. We have a saying in America about being up to various parts of one’s anatomy in alligators, the anatomical part specified being in accordance with the speaker’s level of social nicety or vulgarity. The principal question is not what to do when already so immersed, but how to avoid such immersion and where to turn for guidance when the threat of immersion is first hinted.

B. In Good Time Ask for Help or Refer the Case to a Qualified Examiner

1. *Help!*

The Beatles sang: “I get by with a little help from my friends.” The prudent expert witness

changes “a little” to “a lot” and sings loud, clear and often. When someone compliments me on the contents of my writings or presentations, I respond by saying I never had an original idea, I learned it all from what others have said or written. I only compile it in a hopefully handy and helpful format. I am always looking for help from every fruitful source, the first being the attorney by whom I am retained. Many attorneys, including friends, clients and from the opposition, have either taught me important lessons or directed me to reliable sources of instruction.

A significant portion of my professional services is to respond to other experts who ask confidential guidance on some issue. With the permission of Cina Wong, a board certified document examiner in Norfolk, VA, I use her enquiry as an example. She asked me whether the Commonwealth of Virginia’s rules for admissibility of expert evidence followed *Frye* or *Daubert* so that she might prepare herself for any forthcoming challenges. I researched and found that Virginia followed her own rules that are essentially intact from colonial days. See *90 Judicature*, “Virginia’s Answer to *Daubert’s* Question Behind the Question,” 68-71 (Sept.-Oct. 2006), by Justice D. Arthur Kelsey, Court of Appeals of Virginia. The paper is available at http://www.ajs.org/ajs/publications/Judicature_PDFs/902/Kesley_902.pdf. I also discovered case reports wherein Ms. Wong’s testimony was specifically praised and relied on by the court in rendering its decision, while she had been unaware of these.

2. *Referral to Another Expert*

For this I will use my own practice as an illustration. When enquiry comes to me for chemical testing of inks, for which I am not qualified, I refer the enquirer to Dr. Valery Aginsky of East Lansing, MI. If it is a matter of challenging a proposed ink testing by some other ink expert, I do not hesitate to do so myself, determining whether or not scientific and technical requirements have been met, and whether or not the expert proposes to do what published research proves impossible, unfeasible

or at least problematic. This kind of evaluation has assisted attorneys in preventing proposed ink testing that would spoliate documents, yet the ink expert had failed to demonstrate its scientific validity, much less its legal reliability.

C. Other Possible Issues in the Law

As one example of what may be applicable to expert practice but relates to a tangential issue, I offer the following quote from Federal Rule of Evidence 406:

Habit; Routine Practice:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Handwriting experts routinely use the principle that the graphic habits provable by the exemplar writings by a suspect establish traits significant for identification. If these traits are found in questioned writings, the experts conclude they also were written by the same suspect. However, just as routinely cross-examiners fail to challenge the handwriting expert on whether or not such allegedly habitual traits meet the criteria for proving a habit. Only one expert told me that occurred in a case. The opposing expert asserted that traits appearing in less than half the available exemplars proved the writer's graphic habits. The cross-examiner had the expert agree that a habit is something one does more often than not. Thereupon it was a matter of a few select questions before every "graphic habit" the expert relied on was conceded to have occurred in a minority of instances.

D. Remember, Expert, Dust to Dust and Ashes to Ashes

Kumho Tire Co., Ltd. v. Carmichael, 526 US —, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999), reversing *Carmichael v. Samyang Tire, Inc.*, 131 Fed.3d

1433, states at page 1179:

Carlson himself claimed that his method was accurate, but, as we pointed out in *Joiner*, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." 522 U.S., at 146, 118 S.Ct. 512.

For the young among us far removed from Latin phrases, "ipse dixit" means "he himself has said [it]." Thus, the Supreme Court is advising against accepting evidence merely on the say-so of the expert witness.

The case *Minnesota Mining and Manufacturing Co. v. Atterbury, et al.*, 978 S.W.2d 183 (Ct Ap TX Texarkana 1998), at page 200 gives a perfect application of this view:

[H]erndon based his opinion on his considerable experience in the field of neurology. This evidence goes to whether Herndon was qualified to give an opinion, not on whether his opinion is reliable.

Unfortunately, the prevailing rule in American courts, both federal and state, is that the expert witness's qualifications, especially experience, are considered sound bases for accepting the opinion, whatever countervailing evidence there is and however anemic of substance is the expert's alleged theory or facts underlying the opinion.

A case that came down soundly on the two opposite sides of the issue is *Gammill v. Jack Williams Chevrolet, Inc.*, 875 S.W.2d 27 (Ct App. Tex. Fort Worth 1994); summary judgment after remand affirmed, 983 S.W.2d 1 (Ct App. Tex. Fort Worth 1996); affirmed, 972 S.W.2d 713 (TX 1998). In 972 S.W.2d 713, at page 722 the Supreme Court of Texas makes a supreme self-contradiction:

On the one hand, an exception [under Rule 702] for evidence based on a witness's skill and experience would easily swallow the rule...On the other hand, there are many instances when the relevance and reliability of an expert witness's testimony are shown by the witness's

skill and experience. [Emphasis in original.]

The rule just got swallowed.

The only reported research on this issue that I know of is *47 Journal of Forensic Sciences*, “Forensic Handwriting Examiners’ Expertise for Signature Comparison,” 1117-24 (Sept. 2002), by Jodi C. Sita, et al. Testing the competence of handwriting experts over several years, the authors report that tested and proven expertise had no significant correlation with years of experience.

E. And the Critics Need Criticizing

In *Kumho Tire Co., Ltd. v. Carmichael*, 526 US —, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999), we read at page 1179:

Justice SCALIA, with whom Justice O’CONNOR and Justice THOMAS join, concurring.

I join the opinion of the Court, which makes clear that the discretion it endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function. I think it worth adding that it is not discretion to perform the function inadequately. Rather, it is discretion to choose among reasonable means of excluding expertise that is fausse and science that is junky. Though, as the Court makes clear today, the *Daubert* factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.

The critics of forensic expertise have fostered the myth that the U.S. Supreme Court said the contrary of the above last sentence. They go further and claim the only scientific testing that counts is comparing forensic experts to lay persons performing the same task. They ignore the fact that it always takes a reliable expert to expose the unreliable expert and prove the truth of the matter. There are many other erroneous aspects to the prevailing belief about forensics. However, the question is so complex and the false assertions so convoluted, that another paper of greater length would be

needed to expose and refute the fallacies. This can serve as a hint of how to counter a critic of forensic expertise testifying as an expert: None of them could pass muster under either their own incorrect criteria for admissibility nor under those given in the law as set forth in this paper.

APPENDIX: Outline of a Model Report

Each page of the report would have a footer, such as:

(Report of [date] from [expert’s name] to [recipient’s name]; Expert’s File Name or Number. Re: [name of case]. Page N of NN pages.)

The following model report builds on an actual report in the case *Nazim Omara, Applicant, vs. Al Mal Bank, LLC, Respondent* and addressed to QFC Civil & Commercial Court in Doha, Qatar.

In the model report, square brackets, [], are used for editorial and explanatory comments that would not themselves be included in the report.

If there is a special situation, the expert must incorporate all required statements for the special situation if not already satisfied. One should put them in the most logical place, maybe even reiterating them in a special section for emphasis. One uses any special format required, asking the attorney/client if in any doubt regarding requirements. For example, a particular jurisdiction may have a special form required for the witness’s sworn statement and the jurat, or the attorney may prefer a particular wording.

The model report begins on the next page.

LETTERHEAD

[In the United States, we usually place business name, address, phone, etc., at the top of the first page. However, if one is issuing the report for a case in another country, one would follow the practice in that country, placing these data at the bottom of the page if such is customary in that country.]

Date

Person to Whom Addressed

Organization/Company

Address

City, State ZIP Code

RE: *Name of Case*

My File Ref.: 000000-A

Dear Person-to-Whom-Addressed:

I am issuing this report pursuant to your request.

A. THE COMMISSION

You asked whether the purported signature of X on a certain document, a copy of which is attached hereto as **Exhibit A**, was his genuine signature (hereinafter: the questioned signature).

There were also submitted for my examination other documents which were represented to bear X's authentic signatures. [This must be a complete statement of the factual basis of relevancy, expanding as needed. The attorney must argue the legal basis if challenged. If the expert has any concern about factors excluding relevant evidence, they must be brought to the attorney's attention before writing the report and instructions should be requested.]

I have concluded that X did not sign **Exhibit A**. [This will permit addressing issues often encountered and often misunderstood, even by experts.]

B. THE DOCUMENTS EXAMINED

I relied on the following documents in making my comparative examination:

EXHIBIT A, attached hereto, is [precise description of questioned document].

EXHIBIT B, attached hereto and of N pages, is [either first of the exemplar documents or a collective exhibit of all the exemplar documents, each with precise description.]

[**EXHIBITS C** through ? if exemplar documents are listed separately.]

EXHIBIT D, attached hereto and of N pages, shows the questioned signature from **Exhibit A** and all exemplar signatures from **Exhibit B** enlarged for ease of observation. [All demonstrative exhibits attached are given separate letter identifications.]

EXHIBIT E, attached hereto and of four pages, is my current Curriculum Vitae.

EXHIBIT F, attached hereto and of six pages, is a list of my professional publications as an examiner of documents and handwriting.

EXHIBIT G, attached hereto, is a copy of my Fee Schedule reflecting the rate of compensation for all services I shall render in this case.

EXHIBIT H, attached hereto and of two pages, is a list of my testimonies as an examiner of documents and handwriting for the past four years.

C. THE OPINION

I have concluded that, based on all the available and reliable handwriting evidence, X did not write the disputed signature on **Exhibit A**. [Other pertinent opinions are also given. For the sake of simplicity only a single opinion is given in this model.]

I shall set forth the bases for this opinion, specifically the theory, method and facts that I relied on. Further, I shall state the limitations resulting from the materials available to me and explain how these limitations have been overcome.

D. BASES FOR THE OPINIONS

[Extensive passages illustrate both how to state these bases and how to address challenges to critical issues in expert handwriting identification. Relevant authorities and research reports are cited if requested or if a challenge from the opposing party is indicated.]

1. THEORETICAL BASES. Based on the writings of Ordway Hilton, particularly *Scientific Examination of Questioned Documents*, revised edition, 1982, it can be stated that in order to identify an individual as the writer of a questioned signature it must be shown that there are sufficient significant similarities between the individual's exemplar signatures and the questioned signature so as to eliminate the reasonable probability of another writer, and there should be no significant difference between the individual's exemplar signatures and the questioned signature that cannot be reasonably explained.

In order to prove a disputed or denied signature to be false, it must be shown that there are one or more significant differences between the questioned signature and the genuine signatures of the purported writer for which there is no reasonable explanation.

When relying only on a copy of the questioned document, such as must presently be done in this case for **Exhibit A**, no examiner of documents and handwriting can definitely, beyond a reasonable doubt, authenticate the signature, much less the entire document. What one can do is conclude that the available handwriting evidence supports, to either a probable or highly probable degree, the authenticity of the questioned signature. However, the examiner may be able to make a positive proof of falsity either in the signature or in the entire document, even to a definite opinion.

A definite finding of falsity can be made if there are sufficient significant differences between the questioned and exemplar signatures, which differences cannot be credited to the copying process. In the present case there are cogent significant differences, none of which can be credited to the copying process.

At times it occurs that parties, who rely on the authenticity of documents that they assert are only available in copy, understand the limitations of copies to mean no one can challenge their claims of authenticity. As I explained above, it is they who can never establish the authenticity based on forensic expertise. However, if sufficiently cogent significant differences exist, even a single one of sufficient

cogency, the falsity of the document can be established, at times definitely.

2. METHODOLOGICAL BASES. I adhered to generally accepted methods and procedures in making my comparative examination and arriving at my opinion in the case. See ASTM published standard number E2290-07a, *Standard Guide for Examination of Handwritten Items*, and related ASTM standards.

3. LIMITATIONS INVOLVED. (a) *Number and Noncontemporaneousness of Exemplar Signatures.*

The general rule of thumb in forensic examination of signatures is to have at least twelve genuine signatures for use as exemplars. **Exhibit B** provides twelve exemplars dated within a year on either side of **Exhibit A**.

(b) Availability of Copies Only.

The twelve exemplar signatures are copies save one. Thus, some evidence about handwriting is lost. However, if compelling evidence that cannot be the effect of the copying process is available, it can be relied on.

4. OBSERVATIONAL BASES. It is suggested that the reader have reference to **Exhibit D** to make it easier to follow this discussion. The following chart provides the observational bases of my opinion that X did not sign **Exhibit A**.

HANDWRITING TRAITS	SIGNATURE FROM EXHIBIT A	SIGNATURE(S) FROM EXHIBIT B	SIGNATURES IN OTHER EXHIBITS
TEMPO WORD			
SPACING LETTER			
SPACING FORM OR			
STYLE SIZE/RATIO			
SLANT BASE LINE			

[As appropriate, signatures are considered singly or in groups. Other writing traits are considered when applicable and observable, such as proportion, pressure, arrangement, and continuity.]

E. OPINIONS

[All opinions are restated succinctly.]

F. QUALIFICATIONS

[Reiterated with notations of any further specific qualifications required by the instant case, with examples given.]

Attached hereto and incorporated herein as if set forth in full, **EXHIBIT E** is a copy of my current Curriculum Vitae stating the background and experience that qualify me to undertake the examination

requested and form the opinions expressed herein. On page N, **Exhibit E** lists the presentations and classes I have given related to the examination of questioned signatures. On page N it lists the training programs and presentations I have attended in which this subject was taught.

Attached hereto and incorporated herein as if set forth in full, **EXHIBIT F** is a list of my professional publications as an examiner of documents and handwriting. Items such-and-such on **Exhibit F** concern issues related to the authentication of questioned signatures.

Attached hereto and incorporated herein as if set forth in full, **EXHIBIT G** is a copy of my Fee Schedule reflecting the rate of compensation for all services I shall render in this case.

Attached hereto and incorporated herein as if set forth in full, **EXHIBIT H** is a list of my testimonies as an examiner of documents and handwriting for the past four years. N% of my testimonies involved the authenticity or falsity of questioned signatures.

G. CONCLUSION

If called upon to do so, I would testify under oath in a legal proceeding that all the statements and representations made herein are true and accurate to the best of my knowledge and belief, and I would be prepared to demonstrate and explain the cogent reasons for the opinions expressed herein. If court testimony is required, I would prepare appropriate court exhibits by which to illustrate and explain my observations, opinions and reasons.

Sincerely,

[Signature]

[Expert's Full Name Typed]

Marcel B. Matley, CDE is a San Francisco based handwriting and document examiner. He holds an MALS degree from Immaculate Heart College, Los Angeles. His formal study in handwriting analysis was with Rose Toomey in 1979-1980, with certification by Kathi de Ste. Colombe of the Paul de Ste. Colombe Center in January 1981. That study continues to date with reading in all aspects of handwriting, including document examination literature, medical and psychological research, paleography, education, Western formal penmanship and Oriental calligraphy.

In 1985, Mr. Matley formally began work as a document examiner, which activity is now his full time profession. He is a court-qualified expert witness, has au-

thored several published monographs and articles, and has presented at several professional conferences. He has a library collection of over 13,000 items related to forensics and handwriting. Mr. Matley is Board Certified by NADE and frequently acts as a consultant and mentor to other document examiners.

Mr. Matley and his wife Helen live in San Francisco in a 1908 Victorian which they are progressively enhancing. NADE members who visit the City are welcome to call and arrange to visit.

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